No. 2514.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN, GEORGE STANLEY, and SAM SALLO,

Appellants,

vs.

H. GREENBERG,

Appellee.

BRIEF FOR APPELLANTS.

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FRANK D. MONCKTON, Clerk.

By ....., Deputy Clerk.

THE JAMES H. BARRY COMPANY
SAN FRANCISCO

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STATEMENT OF THE CASE.

This action for the dissolution of a mining co-partnership and for an accounting was commenced on November 1st, 1911. The case was tried on the complaint (Tr. 3), separate answer of George Stanley and Sam Sallo (Tr. 15), separate answer of Jack Lesamis, John Tyapay and Andy Garbin (Tr. 21), reply to separate answer of Jack Lesamis, John Tyapay and Andy Garbin (Tr. 31), reply to separate answer of George Stanley and Sam Sallo (Tr. 37),

cross-complaint of George Stanley and Sam Sallo (Tr. 40) and answer to the cross-complaint (Tr. 45).

This court on February 24th, 1913 (203 Fed., 678) affirmed an order of the lower court denying the plaintiff's motion for an injunction and the appointment of a receiver.

The present appeals on behalf of the defendants below bring up for review the decree of the lower court (Tr. 81) and incidentally the findings of fact and conclusions of law upon which the decree was based; also the order of that court denying defendants' motion to quash the execution issued under the decree or to continue the sale held under the execution (Tr. 103) and to set aside the order confirming the sale on execution (Tr. 122).

The evidence shows that on the 19th day of March, 1910, the plaintiff, Greenberg, entered into a written contract (Tr. 126) with the defendants, Lesamis, Tyapay and Garbin whereby it was agreed "H. Green-" berg is and shall be a full fledged partner with the " above mentioned parties & have one quarter un-" divided interest in all claims, lodes, water-rights, " acquired, or to be acquired and owned by the above " mentioned parties. It is further agreed that H. " Greenberg is to furnish the above mentioned par-" ties with provisions from time to time up to July, " 1910."

On the same day Lesamis, Tyapay and Garbin conveyed by deed (Tr. 128) to Greenberg, his heirs and

assigns, a one-quarter undivided interest in all mining claims located, surveyed, recorded and held by them in the Noatak-Kobuk Mining District, Alaska (without other description), and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever of said grantors of, in or to said premises and every part thereof. The consideration expressed in the deed is $30,000.00, $6,000.00 cash "and the balance of 24,000 to be paid of the first money taken out of the ground."

Subsequently, on June 17th, 1911, after said parties had mined one of said claims for a season Greenberg caused to be prepared another deed (Tr. 141) naming the same grantors and grantee and induced Tyapay and Lesamis to execute it, representing to them that the two deeds were alike (Tr. 228), and that the second deed was wanted because the first was not acknowledged (Tr. 167). Garbin refused to sign the second deed (Tr. 199). The two deeds were not alike. The giving of the second deed was without consideration and signed by only two of the three grantors named therein.

In considering the questions involved on this appeal it will be necessary to construe these agreements for the purpose of determining the terms and duration of the partnership between Lesamis, Tyapay, Garbin and Greenberg; whether they held the mining claims, in which all were interested, as partnership

property or as tenants in common, and how and from what source the balance of the purchase price on the sale to Greenberg was to be paid.

The conduct of the parties throws little light upon the situation. It appears, however, that the parties operated under the name of Klery Creek Mining Company and mined Placer Claim No. 1 above on Klery Creek during the mining season of 1910 (Tr. 130) at a profit of about $7,000.00 (Tr. 131). The profit was divided between Garbin, Lesamis and Tyapay, three of the partners (Tr. 131).

Greenberg's share, whatever it was, was to be delivered to his three partners to be applied upon the purchase price of Greenberg's interest in the mining claims. Greenberg took possession of all the gold and undertook to divide the season's profits among his three partners. Out of these profits he paid Tyapay, Lesamis and Garbin a part of what was due them (Tr. 158), and the balance due each of the three out of the profits was left as credits to the three individuals with Robinson, Magids & Company, a mercantile firm of which Greenberg was a member (Tr. 160). Defendants contend that this arrangement as to credits was wholly unauthorized by them (Tr. 214). It seems that Robinson, Magids & Company subsequently credited the Klery Creek Mining Company with the total amount of these individual credits (Tr. 205) in reduction of the alleged debt of the Klery Creek Mining Co. to Robinson, Magids & Co.,

incurred in mining operations during the season of 1911, which defendants claim were conducted by plaintiff on his individual account and not by the Klery Creek Mining Co. (Tr. 210, 211).

After the partial accounting of the proceeds of mining operations for 1910, Tyapay went to Europe and has never returned (Tr. 172, 224), Lesamis left Alaska and did not return to the mine until about the close of the season of 1911 (Tr. 224), Garbin was at the mine but claims to have been looking after his interests merely as tenant in common.

In 1911 Greenberg employed a foreman and the workmen upon the ground, paying their transportation, wages and sustenance, and used his mercantile firm of Robinson, Magids & Company as disbursing agents. The account rendered by said firm (Tr. 200) shows that all the bills amounting to about $30,000.00, were paid by said firm, it receiving all the gold dust extracted amounting to $8,628.30 and also gold dust of the value of $1,158.58 belonging to one Frank Lesamis, the brother of Jack Lesamis. Robinson, Magids & Company in their account also credited the sums alleged to have been paid in by, or rather credited to, Lesamis, Tyapay and Garbin, amounting to $2,001.00, and certain other smaller items. The account showing a balance in favor of Robinson, Magids & Company of $17,124.00 (Tr. 206).

Before Tyapay departed for Europe Greenberg agreed to loan him $3,000.000, of which sum Green-

berg actually paid him $1,000.00 (Tr. 172). The balance was to be forwarded to Tyapay later. To secure this loan plaintiff took a mortgage for $3,000.00 upon Tyapay's interest in the claims involved in this action and without having remitted to Tyapay the balance of the loan, though Tyapay wrote him for it (Tr. 152), foreclosed the mortgage for the whole amount of $3,000.00, interest and costs (Tr. 172, 174). Greenberg thus became the owner of one-half of the claims in question.

No note of this transaction was taken by the court in the accounting (See decree, Tr. 85), nor did the court, in its accounting, recognize the undisputed claim of Frank Lesamis (Tr. 133), brother of Jack Lesamis, for $1,158.00 appropriated by Greenberg and delivered to Robinson, Magids & Company and by them credited to the Klery Creek Mining Co. (Tr. 166).

In the fall of 1911 plaintiff and defendants executed as individuals certain leases (Tr. 136); royalties under which were to be paid to the lessors and not to the Klery Creek Mining Co. (Tr. 137); these leases were all in the same form. Royalties were collected by representatives of the individuals (Tr. 177, 195, 231).

Subsequently Stanley and Sallo, assignees of Garbin and Lesamis, performed assessment work upon the mining claims amounting in value to the sum of $2,400.00 (Tr. 232). The court in this accounting

failed to credit this amount to anyone (Decree, Tr. 81), although the court in its opinion (Tr. 53) and findings of fact (Tr. 64) recognized their claims.

There was no interlocutory judgment entered in the action nor was any effort made to bring in the creditors of the alleged partnership, or to collect claims, or to pay debts, either through one of the partners or through a receiver.

At the time of the commencement of this action one Philip Murphy, as assignee of Robinson, Magids & Company, brought an action against the parties to this action, to recover advances made, and caused to be levied an attachment upon all of the properties in question herein (Tr. 62). Murphy was in the employ of plaintiff Greenberg (Tr. 235). His action was pending at the time of the trial of this action and is still pending and undetermined (Tr. 11).

Without a trial of the law action the court by its judgment herein made Philip Murphy a preferred judgment creditor and ordered a sale of the attached properties without discharging the attachment (Tr. 83). The court rendered its opinion (Tr. 50) and made and filed findings of fact and conclusions of law (Tr. 55). Defendants proposed amendments, made objections and took exceptions to the findings of fact and conclusions of law (Tr. 67). Judgment was entered (Tr. 81) and objections and exceptions to it made and filed (Tr. 86). Motions for a new trial were made and overruled (Tr. 103).

Without an order of court the clerk issued a writ of execution (Tr. 87), under which the United States Marshal, without making a levy upon the mining claims in question, proceeded to sell the same (Tr. 96). Defendants moved to quash the execution as wholly unauthorized or to postpone the sale pending an appeal from the judgment (Tr. 107). These motions were overruled (Tr. 113). On the coming in of the report of the sale defendants filed their objections to the confirmation of the sale, it appearing in addition to the objections urged against the execution and sale that the marshal returned the execution without delivering to the clerk of the court the sum of $3,000.00 bid by Greenberg at said sale. The bid was not collected (Tr. 121). The marshal evidently treated plaintiff as standing in the shoes of Murphy or as a preferred creditor to the amount of his bid. Defendant's objections to the sale were overruled and the sale confirmed (Tr. 122).

SPECIFICATION OF ERRORS.

1. The court erred in finding that the $24,000.00 balance of the purchase price agreed to be paid by appellee for an undivided quarter of the mining claims mentioned in the complaint were to be paid "from the net profits of the mining operations" (assignment of error No. 1), and "from the mining operations of the co-partnership property" (assignment of

error No. 9), and "from the profits of the co-partnership property" (assignment of error No. 12).

2. The court erred in finding that the placer claims mentioned were partnership assets (assignment of error No. 3).

3. The court erred in finding that the mining claims mentioned in the complaint were liable for the debts of the partnership (assignment of error No. 11).

4. The court erred in finding that leases were let by the partnership and that royalties were payable to the partnership (assignment of error No. 4).

5. The court erred in finding that the claim of Philip Murphy was a debt of the Klery Creek Mining Co. and in adjudicating said claim and giving it preference over the claims of other creditors (assignment of error No. 7).

6. The court having found in its opinion and findings that Stanley and Sallo representing Lesamis and Garbin were entitled to a credit for assessment work done on the claims erred in failing to recognize and allow this claim in the judgment (assignment of error Nos. 13 and 19).

7. The judgment or decree is erroneous in that it embodies the errors in the findings above specified and further as specified in the 21st assignment of error as follows:

It was final in character, but entered before all partnership matters were disposed of and without disposition of same.

a. No opportunity was afforded creditors to present their claims.

b. No provision was made for the collection of claims due the firm.

c. No disposition of the attachment of the creditor Murphy was made, and the same was ignored.

d. The claim of $2,400.00 of Stanley and Sallo allowed in the findings, was wholly forgotten. So also credit of Frank Lesamis as per testimony of Greenberg, $1,158.00.

e. The claims of the partners *inter esse,* after exhausting partnership assets, were left undetermined.

f. No apportionment was made of the balance of the twenty-four thousand dollars due defendants.

g. No partner, master or receiver was appointed to take over the properties and wind up the partnership.

h. The findings were made to operate as an interlocutory judgment of dissolution and partial accounting.

8. The court erred in denying defendants' motion

to quash the execution issued herein (assignment of error No. 22).

9. The court erred in denying defendants' motion to continue on terms the sale on execution herein until the determination of the appeal from the judgment herein (assignment of error No. 23).

10. The court erred in confirming the sale on execution herein (assignment of error No. 24).

THE $24,000.00 BALANCE OF THE PURCHASE PRICE FOR THE QUARTER INTEREST SOLD TO GREENBERG WAS TO BE PAID OUT OF THE PROCEEDS OF THE QUARTER INTEREST.

Magids (who drew the partnership agreement and first deed) testified (Tr. 178): "They offered Green-
"berg a quarter interest in the ground. He pays
"them two thousand dollars in supplies up to July
"10th, then six thousand dollars and twenty-four
"thousand dollars out of the profits of the ground,"
and again (Tr. 189): "the conversations and under-
"standings were concluded before the instruments
"were drawn; they came to a full understanding . . .
"I asked a good many times if that was the agree-
"ment before to make it more plain and Mr. Garbin
"and Mr. Lesamis spoke up and said, 'We under-
"stand that we are to get twenty-four thousand dol-
"lars after the expenses are deducted; we don't ex-
"pect you to pay before the expenses are deducted.'"

The first deed (Tr. 128) to Greenberg reads: "the "balance of twenty-four thousand to be paid of the "first money taken out of the ground," the only ground otherwise mentioned in the deed being "one quarter (¼) undivided of all mining claims located," etc.

The second deed, drawn by Greenberg's attorney, Hobbes (Tr. 141): "parties of the first part . . . "grant . . . unto the said party of the second "part . . . an undivided one-quarter interest of, "in and to all mining claims . . . ($6,000.00 of "said consideration has been paid in cash and hereby "acknowledged; the remaining $24,000.00 is to be "paid from the proceeds of said mining ground . . . "all the first gross output shall be applied to the pay- "ment of said $24,000.00 after necessary expenses of "operating have been deducted)."

Greenberg testified (Tr. 125): "I told them that "I have not got any money to buy property with, none "at all, so they decided to take the money out of the "ground from the profit of the ground."

Garbin says (Tr. 208): "As I understood it the "twenty-four thousand dollars was to come from his "share. First moneys from the ground. He got not "one cent before he pay us twenty-four thousand "dollars from the ground from his share mining."

Lesamis testified (Tr. 222): "For selling the "ground quarter interest we got thirty thousand dol- "lars, six thousand dollars cash; twenty-four thou-

" sand dollars come out of the ground, from his share."

The foregoing was the evidence on the question as to whether or not the twenty-four thousand dollars of the purchase price was to be paid out of the interest purchased by Greenberg or out of the interests of all of the mining partners.

It will be observed that no witness testified and no writing read that the purchase price was to be paid out of the proceeds of *all* of the ground belonging to the partners, the language used by the plaintiff's witnesses and in the deeds being that it was to be paid "out of the ground" which is entirely consistent with the testimony of defendants' witnesses that it was to be paid out of the interest in the ground purchased by Greenberg.

We respectfully submit that the findings of the court to the effect that the twenty-four thousand dollars balance of the purchase price due from Greenberg was to be paid from the net proceeds of the mining operations of the copartnership is not sustained by the evidence.

It would result from the court's finding, should it be affirmed, that this twenty-four thousand dollars would be paid out of the combined interests of Greenberg and the three men from whom he purchased, that is to say, that for a one-quarter interest in their mining claims, these three miners would receive on the purchase price of $30,000.00, $6,000.00 in cash and $24,000.00 more, out of what they and

appellee mined out of the claims, including the interest they had sold to appellant. The three sellers would thus get for this undivided one-quarter interest $6,000.00 in cash and $6,000.00 more out of the quarter interest sold as the full purchase price of the quarter interest. The other $18,000.00 of the purchase price of $30,000.00 they would pay themselves out of their own interests in the mines, so that Greenberg would secure his interest for $12,000.00 instead of the expressed consideration of $30,000.00 which he agreed to pay.

The trial court recognized the reasonableness of the contention of defendants when stating in the opinion (Tr. 52), "If it were not for the interpreta-
" tion placed upon the instruments by the defendants
" as indicated by their settlement in the fall of 1910,
" and by the subsequent deed executed by two of the
" defendants, and the general conduct of all the de-
" fendants the court would be inclined to construe the
" contracts to mean that the $24,000.00 balance of the
" purchase price should be paid from the proceeds
" of plaintiff's one-fourth interest."

We are at a loss to understand to what "general conduct" the court refers.

THE MINING CLAIMS WERE NOT PARTNERSHIP PROPERTY BUT WERE HELD BY GREENBERG, TYAPAY, LESAMIS AND GARBIN AS TENANTS IN COMMON, AND SHOULD HAVE BEEN ADMINISTERED UPON AS THEIR INDIVIDUAL PROPERTY.

Against this contention there appears to be no evidence; in its favor we have (1) the contract of partnership (Tr. 4), where the language used is "Green-" berg is and shall be a full fledged partner with the " above mentioned parties *and* have one-fourth inter-" est in all claims"; (2) from the deed (Tr. 5) given to Greenberg conveying to him *"his heirs and assigns* one-quarter (¼) undivided of all mining claims"; (3) the second deed (Tr. 141) to Greenberg, dated June 17, 1911, signed by Tyapay and Lesamis, which conveyed to "said party of the second part and to his heirs and assigns an undivided one-quarter interest of, in and to all mining claims"; (4) the leases (Tr. 136) which were given September 1st, 1911, "by " and between H. Greenberg, J. Lesamis, Andy Gar-" bin, John Tyapay, by H. Greenberg his attorney " in fact, parties of the first part, Lessees," and signed by each lessee individually providing for royalties to be paid the individuals with no mention anywhere in the instrument of the partnership. One-half the royalties were collected on behalf of Garbin, and Lesamis (Tr. 177) and one-half by the agent of Greenberg and Tyapay; (5) Tyapay gave Greenberg

a mortgage on his individual interest in the claims (Tr. 164, 173, 174), which Greenberg foreclosed against Tyapay as an individual under a judgment for $2,000.00 more than he had a right to and concerning which Greenberg testified (Tr. 174): "I admit that judgment against Tyapay is wrong in "amount. I am willing to deed it back to him after "he pays this debt"; (6) on December 17, 1912, Greenberg and Tyapay, by Sam Magids, sent a letter to Lesamis (Tr. 229), in which they offered to pay their share of the expense of doing the assessment work if Lesamis had done it, saying, that if the affidavits in proof of the labor having been done were not filed by December 22nd "we will send up men to do the work *for us,*" and no mention of the Klery Creek Mining Company was made in the communication. (7) The testimony of Sam Magids, who was plaintiff's witness and the man who drew the partnership agreement and the first deed. Mr. Magids testified (Tr. 178): "I was present when negotiations toward "forming a partnership were had; I heard what was "said on both sides; they were dickering there for a "night and a day or two days; they were explaining "that they were in need of money—had no money to "go ahead and develop the ground—I mean Tyapay, "Garbin and Lesamis; they asked Greenberg and me "to extend them credit; this was refused; finally they "made an offer to sell one-half of the ground and "after talking it over finally came to an agreement;

"Mr. Greenberg was to furnish supplies up to July "10th; *they offered Greenberg a quarter interest in* "*the* GROUND; he pays them two thousand dollars "in supplies up to July 10th, then six thousand dol- "lars and twenty-four thousand dollars out of the "profits of the ground. Garbin, Lesamis and Tyapay "were to have charge of the working and handle it "to suit themselves; writings were made out and "signed; I wrote the instruments" (Tr. 189). "The "conversations and understandings were concluded "before the instruments were drawn; they came to a "full understanding." (8) The mining claims were not purchased with partnership funds and were never entered in the partnership books as partnership assets or as part of the capital stock.

> "Real estate belonging to a partnership will in equity be treated like its personal funds and distributed accordingly. If the title stands in the name of one of the partners he will be held as a trustee of the partnership and be made to account to the other partners according to their several rights and interests; but it by no means follows that real estate used for partnership purposes is partnership property. A contrary presumption prevails when the title is not in the firm and to rebut that presumption it must appear either that it was paid for with the firm money or was by agreement actually brought into the common stock."
>
> "These principles are applicable to all classes of trading and commercial partners. That the same rules govern mining partnerships is quite apparent."

Lindley on Mines, 3rd Ed., Sec. 802.

"All persons having an undivided interest in real property are to be deemed and considered tenants in common."

Compiled Laws of Alaska, Sec. 488.

"The partnership may exist between tenants in common of land in conducting business thereon, without affecting the legal status of the land.

"And it is a recognized rule of law in such cases that where the conduct and acts of the parties in dealing with the estate may with reason be referred to the office of a tenant in common, the courts in construing these acts will prefer to attribute them to that relation."

Holton vs. *Guinn,* 76 Fed., 96, 100;

Thompson vs. *Bowman,* 6 Wall., 317; 18 L. Ed., 736.

"Property may be used for partnership purposes and not belong to the partnership. It may belong either to a third person, to one of the partners, or to the partners as tenants in common.

"A deed of realty to partners if unexplained, vests in them undivided interests as tenants in common."

Grant vs. *Bannister,* 160 Cal., 774, 780.

"In order to transform real estate from its usual character into personality the intention to do so should be made very clearly to appear and the circumstances relied on to evidence such transformation must be such as fairly to exclude every con-

struction under which the property can retain its usual characteristic of realty."

Thompson vs. *Holden,* 117 Mo., 127; 22 S. W., 907.

"Creditors of the individuals would have the first right against property of the individuals and joint creditors the first right against the partnership property."

Rodgers vs. *Meranda,* 7 Oh. St., 180;
Murrill et al. vs. *Neill et al.,* 8 How., 414.

If the real estate did not become partnership property the court should not have administered it as such. The court did not only so administer it but found that the $24,000.00 due from Greenberg was payable out of the partnership assets.

THE LEASES WERE LET BY INDIVIDUALS AND NOT BY A PARTNERSHIP.

The leases let on the mining claims in the fall of 1911 were given on the different claims to different persons, but were all signed in the same manner as the one in evidence (Tr. 136), to wit: "H. Greenberg (Seal); Jack Lesamis (Seal); Andy Garbin (Seal); John Tapay (Seal), by H. Greenberg, His Atty. in Fact." The lease in evidence reads (Tr. 136):

"This agreement made & entered into this 1st day of Sept. 1911, by and between H. Greenberg,

J. Lasamis, Andy Garbin, John Tapay, by H. Greenberg, his attorney in fact, parties of the first part, Lessees, and Mike Boskovitch and Paul Krietz, parties of the second part, Lessees, Witnesseth:" etc.

Stanley and Sallo collected from the lessees $1,300.00 royalty, this representing the shares due to Garbin and Lesamis (Tr. 177), and Levy, bookkeeper for Robinson, Magids & Co., representing Tyapay and Greenberg, collected $1,300.00 royalty, which Magids says he received (Tr. 195).

THE COURT ERRED IN FINDING THAT THE CLAIM OF ROBINSON, MAGIDS & CO., OR THEIR ASSIGNEE, PHILIP MURPHY, WAS A DEBT OF THE KLERY CREEK MIING COMPANY, AND ERRED IN ADJUDICATING SAID CLAIM AND GIVING IT PREFERENCE OVER OTHER CREDITORS.

Defendants contend that the evidence shows that the working co-partnership admitted to have been in existence in 1910, was dissolved in September of that year, and that thereafter plaintiff mined on his own account, and the claim of Robinson, Magids & Co. should have been charged against him and not against the partnership. This is borne out by the testimony of the witnesses Lesamis and Garbin, and by the circumstances of the case (Tr. 223, 211). Tyapay, in the fall of 1910, left for Europe and never returned (Tr. 224); before leaving he mortgaged his property

to plaintiff (Tr. 172). He also gave plaintiff a power-of-attorney to look after his interests (Tr. 146). Defendant Lesamis also departed from Alaska and did not return until a few days before the close of mining operations in 1911 (Tr. 224). Garbin, it is true, remained on the ground, but testifies that he was looking after his interests, while assisting Greenberg's foreman, Mr. Fleming (Tr. 211). Greenberg's firm, Robinson, Magids & Co., seems to have paid all the bills and received all the gold dust. The disbursements amounted to something like $26,271.70 and the total receipts from gold dust to $9,786.88 (Tr. 64). With such large advances on the part of Robinson, Magids & Co., the amount taxed up to the defendants for future expenses, $667.00 each (Tr. 192), would seem to be a mere bagatelle, and if authorized at all, which appellants deny, must have been a credit on individual account.

The fact that the deficit in 1911 was so great, while in 1910, when the defendants were operating, there was a considerable profit, would indicate that some one else was in charge in 1911.

Again, the books of Robinson, Magids & Co. seemed to have furnished at all times all the data regarding the operations in 1911. Not so with reference to the operations of 1910.

As a partner in the firm of Robinson, Magids & Co., plaintiff could not bring an action against the alleged Klery Creek Mining Company, of which

plaintiff was also an alleged partner. It was therefore arranged that plaintiff's clerk, also clerk of Robinson, Magids & Co., one Philip Murphy, should bring an action on account of Robinson, Magids & Co. against the Klery Creek Mining Company. Such action was commenced and an attachment levied on said claims, which action is still pending and undetermined; and this action brought by Murphy was made to serve as a pretext for plaintiff to bring the present action. The proceedings throughout and the result of the present action show an intimate relation between Greenberg, Murphy and Robinson, Magids & Co. This relation was so close that the trial court, by its decree, authorized the clerk of the court to apply the proceeds of the sale on execution to the payment of the claims of Robinson, Magids & Co. *or to Philip Murphy,* and the U. S. marshal, at the time of the sale on execution, allowed Greenberg to bid in the property for $3,000.00 without paying the amount bid, evidently treating Greenberg, Murphy and Robinson, Magids & Co. as one and the same person.

From the undisputed testimony of Greenberg (Tr. 133, 165) and Lesamis (Tr. 224, 225), it appears that gold dust of the value of $1,158.00 belonging to Frank Lesamis, a brother of defendant, Jack Lesamis, was taken and appropriated to the use of the Klery Creek Mining Company. This gold dust seems to have been mingled with the dust belonging to the

partnership and treated as a part of the partnership gold. It was never paid back by the partnership, nor did any one of the partners receive any credit for it in the accounting. In the decree of the court it is not even mentioned. If any claim was to be preferred, this one should have been, for the money was used to pay for labor done on the claims (Tr. 165). At any rate, this claim of Frank Lesamis should have been given an equal chance with the claim of Robinson, Magids & Co.

We do not know what other creditors the partnership may have. They have never been given an opportunity to make themselves known.

THE COURT HAVING FOUND IN ITS OPINION AND FINDINGS THAT STANLEY AND SALLO, REPRESENTING LESAMIS AND GARBIN, WERE ENTITLED TO A CREDIT FOR ASSESSMENT WORK DONE ON THE MINING CLAIMS, ERRED IN FAILING TO RECOGNIZE OR ALLOW THIS CREDIT IN ITS DECREE.

In the opinion filed, the trial court said (Tr. 53):

> "In view of the fact that defendants Stanley and Sallo appear to hold the title in trust for Lesamis and Garbin, any work done by them for the purpose of protecting the title and preventing a forfeiture should be allowed in the final accounting."

And this finding was made (Tr. 64):

> "The court further finds that the defendants in the years 1911 and 1912, in order to prevent a

forfeiture, did the annual assessment work on certain claims mentioned in paragraph V. of the supplemental answer and cross-complaint of defendants Stanley and Sallo of the total value of $2,400.00, and that said amount is chargeable as indebtedness against the said Klery Creek Mining Company and the defendants are entitled to be credited with the same."

This credit was not referred to in the decree and payment is not in any way therein provided for.

THE DECREE WAS FINAL IN CHARACTER, BUT ENTERED BEFORE ALL PARTNERSHIP MATTERS WERE DISPOSED OF AND WITHOUT DISPOSITION OF SAME.

There was no interlocutory decree entered in this case. There was no winding up of the partnership matters through any referee or any of the alleged partners. No notice was given to creditors and no accounting was made as between the individual partners. Robinson, Magids & Co., or perhaps Philip Murphy, was made a preferred creditor, sharing in the distribution of the proceeds of the partnership assets before judgment in the law action and without discharging the attachment. The decree entered was final in form.

If plaintiff operated on his own account in 1911, or, if the real estate was not brought into the partnership, or, if the twenty-four thousand dollars were to be paid out of plaintiff's quarter interest, then the decree ordering a sale of the properties and distri-

bution of its proceeds in the manner adjudged, must be held to be erroneous.

But, whether erroneous in above respects or not, it is erroneous because Robinson, Magids & Company were, by the decree, made preferred judgment creditors while their claim was in litigation in a law action, and without discharging their attachment in said action.

Said decree was erroneous for the further reason that it does not adjudicate the rights of the parties among themselves.

It is apparent from the testimony, that the plaintiff Greenberg was indebted to the defendants on account of his purchase of the one-quarter interest above mentioned. In such case, judgment should be entered in their favor after a full and complete accounting of the partnership affairs.

As was said in the case of *Albery* vs. *Geis,* 82 Pac., 262, 1 Cal. App., 381:

> "The recitals in the finding do not show that any account has been taken of outstanding indebtedness the firm might be owing to any other person, nor of any claims the firm may have had against any person, nor of any firm assets, other than those mentioned in said finding, and no statement or finding that all the assets had been exhausted. An accounting means that there is to be a complete winding up of the affairs of the partnership."

The decree rendered purports to be final, and is therefore appealable:

Harrison vs. *Clarke,* 164 Fed., 539.

Because plaintiff brings this action and asks for a sale of the properties, his contract to pay on bedrock was superseded, and he should pay the purchase price.

Pritchard vs. *McLeod,* 205 Fed., 24;
Harrison vs. *Clarke,* 164 Fed., 539.

In *Pritchard* vs. *McLeod, ante,* this court went into a full discussion of the rule in such cases. There should have been a personal judgment against the plaintiff. As it was, the claim of defendants was placed at the foot of items entitled to participate in the proceeds of the lands decreed to be sold, and they were left to take the chance of the sufficiency of said proceeds and without a judgment over against the plaintiff.

If defendants be held to be partners of plaintiff, they are entitled, in the final accounting, to have an adjustment of the capital stock.

Plaintiff did not contribute his share. By the sale of the properties his share of the indebtedness to Robinson, Magids & Company was partially wiped out and his own indebtedness to the defendants completely wiped out. Defendants were not even allowed credit for the two thousand and one dollars (Tr. 205, 193)

appropriated by Robinson, Magids & Company, nor for assessment work performed by them (Tr. 64).

By the account of Robinson, Magids & Company (Tr. 205) it appears that two thousand and one dollars were paid on the outfit delivered May, 1911. By Magids' testimony (Tr. 192, 193), it appears that this two thousand and one dollars was paid by Garbin, Lesamis and Tyapay, out of their proceeds of the operations of 1910. Greenberg paid no part of it (Tr. 194).

In the findings of fact (Tr. 64) we find:

"The total expense for the year 1911 was $26,271.70, " and the total gold production for the year 1911, " amounted to $9,786.88, leaving an indebtedness due " the Robinson, Magids & Company, or its assignee, " of $16,484.82 on the first day of September, 1911, " with legal interest to date amounting to $2,830.12"; and the decree (Tr. 82) provides that the partnership is indebted to Murphy in the sum of $19,314.94. Thus the defendants in the court's accounting received no-benefit whatsoever because of the $2,001.00 they had advanced toward the 1911 expenses, the court taking into consideration only the total expense and the total "gold production" of that season. Greenberg was nowhere made to contribute his share of this $2,001.00.

THE COURT ERRED IN DENYING DEFENDANTS' MOTIONS TO QUASH THE EXECUTION; TO ADJOURN THE SALE; AND AGAINST THE CONFIRMATION OF THE SALE.

Defendants contend that there is no authority in the clerk of the court to issue execution on the judgment herein. Section 1097 of the Compiled Statutes of Alaska provides in what cases execution may issue, to wit, on judgments for the payment of money or for delivery of real or personal property, and that executions are only three kinds, to wit: against property of a judgment debtor or against his person, or for the delivery of real or personal property.

Such executions are not adapted to execute the judgment in this action. The enforcement of judgments in equity cases depends upon the judgment and orders of the court, or, as provided for in Sections 1213, 1214, of the Compiled Statutes of Alaska. It will be readily seen that the nature of the judgment in this action does not require or admit of the sale on execution provided for in said Section 1097.

Indeed, the judgment itself provides that the sale contemplated shall be made on the order of the court (Tr. 84). The order so contemplated is not any order contained in the decree or judgment, but a subsequent order which it is fair to presume would provide for the time, place and manner of sale; the terms of sale; whether the property should be sold in parcels, or as a whole, and whether on credit or

for cash, and what notice of sale should be given and for a conveyance to the purchaser.

This is but following the practice in federal courts.

Act of March 3rd, 1893, Revised Statutes 1901, page 710;
Freeman on Execution, Par. 274, and notes;
Gray vs. *Brignardello* (U. S.), 17 L. Ed., 692; 68 U. S., 627.

But it is not only because of want of authority in the marshal to proceed to a sale of the premises in question that plaintiff objects to the sale and notice thereof in the present instance; the affidavit (Tr. 109) on which the motion was based recites that no levy has been made upon the premises in question. Section 1106 of the Compiled Statutes provides that execution shall be levied in like manner as a judgment, to wit: that real property shall be levied upon by leaving with the occupant, or if no occupant, then in a conspicuous place on the premises, a copy of the writ, and said section in the fifth subdivision also provides that until a levy the property shall not be affected by the execution. No counter-affidavit was served, and we assume that the facts are as stated in the affidavit.

The Alaska Statute differs from that of most States, and like that of California, requires a levy before sale.

Freeman on Executions, Secs. 280, 280a;
Compiled Statutes of Alaska, Sec. 1106.

Under the Alaska Statute and Practice (Section 1585, Compiled Statutes), a receiver should have been appointed "to dispose of the property according to the judgment."

Without an order of the court, and probably without a receiver and the taking of the property into the custody of the court, no conveyance or transfer of the title is provided for or can be made.

The judgment is void on its face for uncertainty and cannot support an execution or be enforced.

The court should, on the grounds stated in the affidavit in support of the motion herein, and on authority have postponed the sale though it did not quash the execution. This would seem to be the practice of the courts where an appeal without supersedeas from the decree of sale is pending or is about to be taken.

Beach, Modern Eq. Pr., Section 905;
Bound vs. *Railway Co.,* 55 Fed., 186.

Where the interests of the parties require it, the court will postpone the sale:

Maxmedous Land Co. vs. *McGorock,* 96 Vir., 131; 30 S. E., 460.

In view of the want of authority on part of the marshal, however, it would have been far better and more practical to quash the execution and thus prevent a sale under a void writ and prevent litigation, to set aside a void sale.

A motion to quash execution may be made at any time:

Freeman on Execution, Sec. 76.

The rule that where there is an adequate remedy at law, equity will not interfere, has no application to a motion of this kind, but only to actions or suits calling for the exercise of the jurisdiction of a court as an original proposition.

Greenberg bid in the property sold for the sum of $3,000.00. The amount of the bid was not returned by the marshal with the execution (Tr. 96). In fact, it was never collected by the marshal (Tr. 121), he evidently treating Greenberg as standing in the shoes of the creditor Murphy, or as a preferred creditor to the amount of his bid. Despite these facts, the sale to Greenberg, one of the partners, largely indebted to other creditors of the partnership and to his other partners, was confirmed and a conveyance directed to be made to him (Tr. 123).

Finally: this appeal presents a case in which the plaintiff, appellee, is shown to have secured to himself a quarter interest in certain mining claims upon the payment of only a small portion of the purchase price; another quarter interest in said mining claims by foreclosure of a fraudulent mortgage; the benefit of the assessment work of his co-tenants without contribution; gold dust belonging to others without accounting therefor; a discharge of personal debts by

loading them upon an alleged co-partnership; a conversion of property, held in private ownership, into partnership capital and then absorbing it without money and without price.

By the judgment and sale thereunder, the private property of appellants has been dissipated and their just claims ignored; a stranger to the action has been made a preferred judgment creditor, and other creditors have been left out of consideration; costs were awarded to plaintiff and made a charge against specific property; and, also against the defendants personally.

All of which not only suggests error, but that a great injustice has been done.

Respectfully submitted.

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